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No. 82-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLARENCE W. ARRINGTON,

Petitioner,

v.

THE NEW YORK TIMES COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION OF THE NEW YORK TIMES COMPANY

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Respondent
The New York Times Company

Of Counsel:

DEAN RINGEL
HOWARD G. SLOANE
RICHARD COLL
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

KATHARINE P. DARROW
GEORGE FREEMAN
The New York Times Company
229 West 43rd Street
New York, New York 10036

December 15, 1982

Questions Presented

1. May this Court review a decision of the New York Court of Appeals dismissing a privacy action assertedly based on New York State statutes and New York common law, when the Court of Appeals held that established principles of state law provided no basis for relief and required dismissal?

2. Whether the New York Court of Appeals erred in concluding that the United States Constitution does not require the recognition of a novel constitutional right of privacy against a private newspaper which uses a photograph of an individual in connection with and to illustrate a related article of public interest?

Parties Below

The parties to the proceedings below were Clarence W. Arrington, plaintiff, and The New York Times Company*, Gianfranco Gorgoni, Robert Pledge and Contact Press Images, Inc., defendants.

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* As required by Supreme Court Rule 28.1, The New York Times Company ("The Times") advises the Court that it has no subsidiaries or affiliates incorporated under the laws of any of the United States other than wholly-owned subsidiaries, except Northern SC Paper Corporation.

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Constitutional and Statutory Provisions:

The First Amendment to the Constitution and the provisions of the Constitution upon which petitioner premises his assertion of a constitutional right of privacy are set forth in the Appendix to the Petition.

Statutes:

Sections 50 and 51 of the New York Civil Rights Law (McKinney 1976 & Supp. 1982-83) are set forth below:

§ 50. *Right of privacy*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. *Action for injunction and for damages*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting

in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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Opinions Below

The opinion of the New York State Supreme Court, New York County (Special Term), granting respondents' motion to dismiss petitioner's complaint, but granting petitioner leave to serve an amended complaint against The New York Times Company ("The Times"), is not officially reported, but is unofficially reported at 5 Media L.Rep. (BNA) 2581 (Sup.Ct. N.Y. Co. 1980), and is set forth as Appendix D to the petition. The opinion and order of the New York State Supreme Court, Appellate Division, First Department, which modified Special Term's decision by striking petitioner's leave to serve an amended complaint, and which otherwise affirmed the order of Special Term dismissing petitioner's causes of action, is reported at 78 A.D. 2d 839, 433 N.Y.S.2d 164 (1st Dep't 1980), and is set forth

as Appendix C to the petition. The opinion and order of the Court of Appeals of New York, affirming the Appellate Division's decision concerning the dismissal of the complaint against The Times, and modifying the decision as regards defendants Gianfranco Gorgoni ("Gorgoni"), Robert Pledge ("Pledge") and Contact Press Images, Inc. ("Contact Press"), so as to reinstate petitioner's statutory causes of action against these latter three respondents, is reported at 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), and is set forth as Appendix A to the petition. That court's order dismissing petitioner's motion for reargument as untimely and denying certain respondents' motion for reargument is unreported, and is set forth as Appendix B to the petition.

Jurisdiction

The petition purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3)(1976).

Such jurisdiction is contested by respondent.

1. Although the petition recites that "[a] timely petition for reargument" of the decision of the New York Court of Appeals was filed and "denied" (Pet. 2)* it does not note that petitioner's own motion for rehearing was dismissed by that court as untimely; the order of dismissal is set forth in App. B, p. 36. A timely petition for reargument was made by the respondents other than The Times, but it is not clear that the liberality of this Court's Rule 20.4 was intended to render timely a petition for certiorari based on one party's timely request for rehearing where the petitioner himself made an untimely application for reargument and thereafter failed to file a petition within 90 days

* Reference to "Pet. ...." is to the Petition for Certiorari at the indicated page.

of the original decision or seek an extension of that time before its expiration as required by Rule 29.2 of this Court.*

2. No jurisdiction exists with respect to the first question presented by the petition under 28 U.S.C. § 1257(3) because the New York Court of Appeals concluded that the applicable law of New York did not support the state statutory and common law claims advanced by petitioner. The court premised its decision on the well developed body of state law and not on any conclusion that the United States Constitution "prohibits recognition" of plaintiff's claims as the petition asserts. There was no decision made with respect to the United States Constitution or the "treaties or statutes of, or commission held or authority exercised under the United States" with respect to this question and hence no jurisdiction to review this matter. This deficiency is dealt with at greater length in Part I of the argument in this Brief in Opposition.

Statement of the Case

In this action, petitioner sought recovery for alleged violations of his right of privacy which he attributes to the use of a photograph of petitioner on the cover of an issue of the Sunday magazine section of *The New York Times*. Petitioner's action for damages and injunctive relief for injuries allegedly incurred as a result of the publication of the photograph was predicated on Sections

* The Court of Appeals decided the case on April 7, 1982. Accordingly, petitioner had until July 6, 1982 to file a petition or to seek an extension of time to do so. Respondents Contact Press Images, Inc., Gorgoni and Pledge timely sought reargument of the New York Court of Appeals and that motion was denied on July 2, 1982. On that same date plaintiff's motion for reargument was "dismissed as untimely" by the New York Court of Appeals. Petitioner did not seek an extension of time from Justice Marshall until September 17, 1982.

50 and 51 of the New York Civil Rights Law and on New York common law and constitutional grounds. In addition to The Times, the complaint named as defendants (i) Gorgoni, the freelance photographer who allegedly took the photograph at issue, (ii) Contact Press, the photographic agency which supplied the photograph to The Times, and (iii) Pledge, the president of the agency.

The Article Published In Connection With The Photograph In Question

The photograph of petitioner appeared on the cover of The Times' December 3, 1978 Sunday magazine section. As petitioner explicitly acknowledged in his complaint, it was published "in connection" with an article entitled "The Black Middle Class: Making It", written by William Brashler. The article presented the author's analysis of a social issue of unquestioned significance—the role of the expanding black middle/professional class in today's society.

The article which the cover photograph illustrated discussed the rapid growth and upward mobility of "an American black middle/professional class". It portrayed the lives of some of the members of this class, including an industrial relations manager, a journalist, a receptionist and a public relations executive. Among the themes in the article were that the black middle/professional class is "flourishing and swelling", that because of the diversity of careers and lifestyles "it [is] increasingly difficult today to define a 'black community' ", that in general the mobile middle class "is carving a distinct identity for itself", that it is growing more removed from its less fortunate brethren though many middle class blacks have not lessened their concern for poorer blacks, and that the resultant relationships between middle/professional class blacks and whites, and among black men and women, have become more complex.

Proceedings Below

Petitioner commenced this action by the service of a summons and complaint dated June 26, 1979. On September 5, 1979, The Times timely served a motion pursuant to Rule 3211(a)(7) of the New York Civil Practice Law and Rules (McKinney 1970) (the "CPLR") to dismiss the complaint on the grounds that it failed to state a cause of action. The Times contended that since, under long established New York precedent, Sections 50 and 51 of the New York Civil Rights Law provide the exclusive remedy in New York State to a party complaining of the unauthorized publication of a photograph, petitioner's common law and constitutional causes of action for invasion of privacy should be dismissed. The Times further argued that since the photograph was not used for "advertising purposes, or for the purposes of trade" as those statutory terms have been defined by the New York courts, petitioner's claims under Sections 50 and 51 of the New York Civil Rights Law (McKinney 1976 & Supp. 1982-83) should also be dismissed. On September 14, 1979, the three other respondents also moved to dismiss the complaint on the ground, *inter alia*, that it failed to state a cause of action, incorporating The Times' memorandum of law in support of their motion.

On March 7, 1980, the New York State Supreme Court (Special Term), New York County (per Louis Okin, Acting Justice), entered a memorandum decision granting respondents' motion to dismiss the complaint, but also granting petitioner leave to serve an amended complaint against The Times excluding claims of alleged violations of Sections 50 and 51 of the New York Civil Rights Law.

On April 8, 1980, The Times served and filed its Notice of Appeal of Special Term's decision.

On November 25, 1980, the New York State Supreme Court, Appellate Division, entered an order which modi-

fied Special Term's decision by striking petitioner's leave to serve an amended complaint based on alleged constitutional and common law privacy grounds. The Appellate Division otherwise affirmed the order of Special Term dismissing the petitioner's cause of action under Sections 50 and 51 of the New York Civil Rights Law, and stated in an accompanying opinion, "Special Term ruled correctly that plaintiff has no cause of action under the [New York] Civil Rights Law, but neither does he have a cause of action for violation of a common law or constitutional right of privacy."

The New York Court of Appeals, on April 7, 1982, entered an order affirming the decision of the Appellate Division insofar as it dismissed all the causes of action alleged in petitioner's complaint against The Times and those causes of action asserted against the remaining respondents that were based on constitutional or common law grounds.* In reaching its decision with respect to the claim asserted under the state statute, the Court of Appeals traced the origins of the statute to its own 1902 decision rejecting any New York common law basis for a privacy claim, *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538 (1902) (Pet. App. 30-31). The Court of Appeals said that in response to that decision the legislature enacted a statute "narrowly drafted" to "encompass only the commercial use" of a "name or likeness and no more." (Pet. App. 31)

Given this narrow scope, the Court of Appeals noted that, except in certain circumstances, newspaper use of a photograph to illustrate an article of public interest would not normally be considered a use for "advertising" or "trade", the terms of the statute. It dealt with the long

* The Court of Appeals reinstated that part of petitioner's complaint which asserted causes of action against Gorgoni, Contact Press and Pledge based on Sections 50 and 51 of the New York Civil Rights Law.

line of New York cases so holding and the narrow exceptions to that general rule, specifically concluding (Pet. App. 32-33) that the petitioner's situation does not fit within the scope of the statute. The court also stated that no common law claim for privacy has been recognized in New York. (Pet. App. 31) Finally, the court rejected plaintiff's claim that a constitutional right of privacy had been abridged by publication, stating that "since no State Action is involved, plaintiff's constitutional claim must fail." (Pet. App. 35)

On May 10, 1982, petitioner served and filed a motion for reargument in the New York Court of Appeals, which The Times opposed, *inter alia*, on the grounds that said motion was untimely under Rule 500.9(f) of the Rules of the New York Court of Appeals.* In response to The Times' brief in opposition to the motion for reargument, petitioner filed an application before the New York Court of Appeals for an extension of time within which to move for reargument. On July 2, 1982, the New York Court of Appeals denied petitioner's application for an extension of time within which to move for reargument, and dismissed petitioner's pending motion for reargument as untimely. The petition to this Court followed after petitioner had sought on September 17, 1982 and obtained on September 21, 1982 an extension of time in which to file.**

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* Rule 500.9(f) requires that a motion for reargument be served not later than 30 days after the appeal or motion for which reargument is sought has been decided. Since the New York Court of Appeals' decision on which petitioner sought reargument was rendered on April 7, 1982, service of the motion for reargument on May 10, 1982 was untimely.

** It is respectfully submitted that the present petition is untimely in light of the petitioner's failure to file or seek an extension of time to do so within 90 days of the April 7, 1982 decision of the Court of Appeals. See Rules 20.4 and 29 of the Rules of this Court. The factual predicate for this is set forth under the "Jurisdiction" section of this Brief.

REASONS FOR DENYING THE WRIT

1.

The New York Court of Appeals Decision Holding That Petitioner's Complaint Failed to State A Cause of Action Under New York's Statutory and Common Law Was Based on Adequate and Unreviewable State Grounds.

The petition asserts that "The New York Court of Appeals was obviously of the erroneous view that a privacy action against the Times would violate the first amendment." (Pet. 10) Neither at this point nor elsewhere does the petition point to any language by the Court of Appeals adopting such "view". In fact, the Court did not offer any such observation, let alone premise its decision on such conclusion. Instead, the decision of the Court of Appeals denying petitioner's statutory and common law claims was based explicitly on that court's longstanding rejection, as a matter of New York law, of any common law right of action for invasion of privacy and its almost equally longstanding, narrow interpretation of the statutory exception to the common law, an interpretation, which the court notes, was well known to and undisturbed by the New York legislature. The decision of the Court of Appeals as to the common law and statutory claims of petitioner was premised directly upon the established law of New York.

The tenuousness of petitioner's attempt to turn an interpretation of New York law into a federal constitutional ruling is reflected in the petition's explanation of why the decision must have been grounded in the Constitution: "the only *plausible* reason the court below reached this result [dismissal of the complaint] was its incorrect view that the First Amendment bars a cause of action against the

Times." (Pet. at 10 (emphasis supplied)) Apparently because petitioner is unpersuaded by the Court of Appeals' dispositive application of New York law with respect to the statutory and common law claims, petitioner would infer that some other, unstated rationale must underlie the decision. This is an unacceptable basis upon which to base the jurisdictional predicate for review by this Court.

Petitioner's statutory claim was grounded on Sections 50 and 51 of the New York Civil Rights Law, which prohibit the use of the name, portrait or picture of any living person, without consent, when that use is "for advertising purposes, or for the purposes of trade." Thus, as a threshold matter, the Court of Appeals had to determine whether The Times' use of petitioner's photograph met the statutory requisites of Sections 50 and 51.

The Court of Appeals noted that the origin of the statute can be traced to the court's own rejection of a common law action for privacy in *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538 (1902). In that case the court declined to grant a right of action to a young girl whose picture had been used on 25,000 commercial advertisements for flour. The legislature responded by the passage of Sections 50 and 51 of the New York Civil Rights Law. As Judge Fuchsberg, writing for a unanimous court, emphasized, these sections

> "were drafted narrowly to encompass only the commercial use of an individual's name or likeness and no more. Put another way, the Legislature confined its measured departure from existing case law to circumstances akin to those presented in *Roberson*. In no other respect did it undertake to roll back the court-pronounced refusal to countenance an action for invasion of privacy." 55 N.Y.2d at 439, 434 N.E.2d at 1321, 449 N.Y.S.2d at 943 (Pet. App. 31).

Significantly, the Court of Appeals noted the legislature has not

> "chosen to enlarge the scope of sections 50 and 51 in the fourscore years since *Roberson* was handed down. This despite the Court's consistent adherence to its position that, as such, in this state 'there exists no so-called common-law right to privacy' . . . ." 55 N.Y.2d at 440, 434 N.E.2d at 1321, 449 N.Y.S.2d at 943 (Pet. App. 31).

Thus, the narrowness of Sections 50 and 51 has been established since its enactment "fourscore" years ago, well before the Supreme Court of the United States first suggested that the First Amendment restricted the states. *See Gitlow* v. *United States*, 268 U.S. 652 (1925).*

The opinion of the Court of Appeals went on to note, in its only reference to the federal Constitution with respect to the statute, that the narrow reading "has not been without sensitivity" to the "potentially competing" nature of the values at issue, on the one hand the protection of privacy against invasion for purposes of "advertising" or "trade" and on the other "the values our State and Federal Constitutions bespeak in the area of free speech and free press." 55 N.Y.2d at 440, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 31). This general concern for free speech values, providing an additional policy basis for the narrow interpretation of a statute already in place even before the First Amendment was applied to the states, and acquiesced in over the years by the legislature, hardly supports an

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* That the need for a narrow interpretation of Sections 50 and 51 was recognized in New York long before the First Amendment was thought applicable to the states is made clear by the early interpretation of the statute. *See Moser* v. *Press Pub. Co.*, 59 Misc. 78, 81, 109 N.Y.S. 963, 965 (Sup. Ct. Sullivan Co. 1908) (declining to apply statute broadly to newspapers); *cf. Humiston* v. *Universal Film Mfg. Co.*, 189 A.D. 467, 178 N.Y.S. 752 (1st Dep't 1919).

assertion that the Court of Appeals held the "First Amendment bars a cause of action."

Indeed the Court of Appeals set forth explicitly what it held did bar petitioner's claim—his inability to come within the long-established interpretation of what constitutes "trade" or "advertising" within Sections 50 and 51:

> "Thus, we not too long ago reiterated that '"[a] picture illustrating an article on a matter of public interest is not considered used for the purposes of trade or advertising within the prohibition of the statute * * * unless it has no real relationship to the article * * * or unless the article is an advertisement in disguise"' (*Murray* v. *New York Mag. Co.*, 27 NY2d 406, 409 [magazine cover photograph illustrating a feature story], quoting from *Dallesandro* v. *Holt & Co.*, 4 AD2d 470, 471, app dsmd 7 NY2d 735). And this holds true though the dissemination of news and views is carried on for a profit or that illustrations are added for the very purpose of encouraging sales of the publications (*see Pagan* v. *New York Herald Tribune*, 26 NY2d 941, affg 32 AD2d 341, 343; *Callas* v. *Whisper, Inc.*, 198 Misc 829, affd 278 App Div 974, affd 303 NY 759; *Oma* v. *Hillman Periodicals*, 281 App Div 240, 244; *Paulsen* v. *Personality Posters*, 59 Misc 2d 444, 447-448 [FRANK, J.]; *Lahiri* v. *Daily Mirror*, 162 Misc 776 [SHEINTAG, J.])." 55 N.Y.2d at 440, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 31-32).*

Recognizing the consistent interpretation of New York law, Judge Fuchsberg, speaking for a unanimous Court of

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* The *Murray* case, relied upon by the court, involved the court's rejection of a very similar claim under Sections 50 and 51 by an individual whose photograph had been used on the cover of a magazine. *Murray*, like the the present decision, was premised on statutory, not constitutional grounds. *See Murray* v. *New York Magazine Co.*, 27 N.Y.2d 406, 409, 267 N.E.2d 256, 258, 318 N.Y.S.2d 474, 476 (1971).

Appeals, dismissed petitioner's effort to fit within these long-established exceptions. The opinion noted that the article was clearly a subject "of public interest" under New York's standards and that notwithstanding petitioner's efforts to claim the absence of a "real relationship" between article and photograph, petitioner did not deny that by external and objective criteria "he may be perceived to be a member of 'the black middle class' "—the subject of the article. 55 N.Y.2d at 441, 434 N.E.2d at 1322, 449 N.Y.S. 2d at 944.

> "Plaintiff's emphasis, rather, is on the fact that, as he reads it, the article depicts the 'black middle class' as one peopled by 'materialistic, status-conscious and frivolous individuals without any sense of moral obligation to those of their race who are economically less fortunate', a conception of the 'class' with which he disclaims any 'legitimate connection'." 55 N.Y.2d at 441, 434 N.E.2d at 1322, 449 N.Y.S.2d at 944 (Pet. App. 32) (footnote omitted).

The court continued:

> "The asserted lack of a 'real relationship' boils down then, to his conviction that his views are not consonant with those of the author. But this disagreement cannot extend the compass of sections 50 and 51 for, in such matters, it would be unwise for us to essay the dangerous task of passing on value judgments based on the subjective happenstance of whether there is agreement with views expressed on a social issue." 55 N.Y.2d at 441, 434 N.E.2d at 1322-23, 449 N.Y.S.2d at 944-45 (Pet. App. 33).

Petitioner's claim under New York common law faced an even more difficult obstacle. As Judge Fuchsberg said:

> "[I]n this State 'there exists no so-called common law right to privacy' (*Cohen* v. *Hallmark Cards*, 45 N.Y.2d

493, 497, n.2; *see, also, Wojtowicz* v. *Delacorte Press*, 43 N.Y.2d 858; *Gautier* v. *Pro-Football, Inc.*, 304 N.Y. 354, 358)." 55 N.Y.2d at 440, 434 N.E.2d at 1321-22, 449 N.Y.S.2d at 943-44 (Pet. App. 31).*

The opinion of the New York Court of Appeals does not suggest a bar under the First Amendment to petitioner's causes of action, but rather holds that petitioner has failed to state a cause of action for which New York statutory or common law provides relief. The decision below regarding petitioner's statutory and common law claims is based on adequate and nonreviewable state grounds.

This Court has made clear it will not review a state court judgment based upon an adequate and independent state ground, since:

> "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

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* Judge Fuchsberg also rejected petitioner's assertion of a "false light" type of privacy claim. Such claims, if cognizable at all in New York, have been cognizable only under Sections 50 and 51 which the court found unavailable here. Further, after examining the facts alleged by petitioner concerning the use of his photograph with reference to the standards for a "false light" claim set out in the Restatement (Second) of Torts, § 652E (1977), Judge Fuchsberg pointed out that, "even assuming, but not now deciding, that such an action is cognizable in [New York], by no means does this case measure up to this kind of criterion." 55 N.Y.2d at 442, 434 N.E.2d at 1323, 449 N.Y.S.2d at 945 (Pet. App. 34). Three other judges concluded that this additional discussion of false light was unnecessary to the dismissal and concurred separately on this point.

Accord, Berea College v. *Kentucky,* 211 U.S. 45 (1908); *Murdock* v. *City of Memphis,* 87 U.S. (20 Wall.) 590 (1874); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935). This principle has been adhered to even where a decision rested on both adequate state and federal grounds for, if the state court rested its decision "upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller, supra,* 296 U.S. at 210. Where, as here, the decision of the New York Court of Appeals relating to petitioner's statutory and common law claims rests solely upon a consideration and interpretation of New York statutes and case law, there can be no doubt that adequate state grounds exist, precluding review of this portion of the decision below by this Court.*

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* Petitioner's invitation to this Court to review the decision of the New York Court of Appeals on the grounds that ". . . the court below decided this case informed by an erroneous view of the weight to give the competing interests in this case, [and that] this Court should correct that error by making clear that the *Gertz* rules also apply to privacy actions" is wholly inappropriate. Not only is the question of the fault standard to be applied after *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974) and *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967) not raised in any of the decisions below, but it is an issue not germane to a resolution of the case. Petitioner's complaint alleged that respondents' use and publication of the photograph was accomplished "recklessly, knowingly, unlawfully and without the prior knowledge, consent or permission, oral, written, or otherwise, of plaintiff. . . ." Notwithstanding these assertions, presumably raising both constitutional malice and negligence, the courts below found that petitioner's complaint failed to state a claim upon which relief could be granted. Thus, the issue of the distinction between two standards of "malice" and "negligence" is simply not raised here. The afterthought nature of this point is in some senses highlighted by the fact that petitioner has not even chosen to include the complaint in his appendix.

2.

The New York Court of Appeals Correctly Ruled that the Constitution Does Not Create A Right of Action For Petitioner Here.

Petitioner's argument in Point II of the petition that ". . . [i]n failing to give [petitioner] . . . a cause of action against The Times, the decision of the lower court violates the federal constitutional right of privacy" rests on a series of propositions which have been rejected by this Court in strikingly similar cases.

It should be noted at the outset that the petitioner's brief does not discuss this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), which rejected a privacy claim made by an individual whose photograph had been included by the police as part of a list of "Active Shoplifters." The Court concluded that this distribution did not involve a deprivation of a constitutional right. With respect to the privacy claim, the Court stated:

> "While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power. See *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968). And our other 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'funda-

> mental' or 'implicit in the concept of ordered liberty' as described in *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). *The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.* In these areas it has been held that there are *limitations* on the States' power to substantively regulate conduct." 424 U.S. at 712-13 (emphasis supplied).

Petitioner's present claim, like that in *Paul* v. *Davis*, *supra*, is not based "upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private'" (*id.* at 713). It is thus clear that a constitutional right of privacy could have no application in the present circumstances.

In every case in which this Court has recognized a constitutional claim for invasion of privacy, an essential element of the claim is a challenge to the "'state's power.'" *Paul* v. *Davis*, *supra*, 424 U.S. at 713. There must be state action before there can be a constitutional violation. The court below so held and petitioner does not challenge this. Instead he argues that the power of the press is such that it should be treated as government. This theory stands the Constitution on its head. It has been soundly rejected by this Court.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this Court unanimously rejected the argument that the power of the press with respect to the shaping of public opinion permits regulation of the press in the name of the First Amendment. The press of this nation was protected by the Constitution so that it could remain "forever free to censure the Government." *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (*per*

curiam) (Black, J., concurring); it remains a critic, not a branch, of the government.*

No more supportable is petitioner's claim that "denial of relief . . . by the state courts itself constitutes state action for the purpose of the Fourteenth Amendment" (Pet. 19). Petitioner is forced to acknowledge that none of the cases he cites directly supports his assertion here; and none does. There are cases, such as *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in which state action is found in rules *imposing* liability in private civil suits, where state law altered the status quo of the parties. Contrary to petitioner's allegation that "the New York Courts have applied a state rule of law which petitioner claims to violate his constitutional right of privacy" no such rule has been applied. The state has simply held that its law does not limit the relations between private parties in this area. This is quite literally, government non-action. Were petitioner's view of state action the law, every private suit in which a complaint was dismissed by the state courts would give rise to a potential constitutional claim. The absurdity of the approach is reflected in the absence of case law support.

Even were government action sufficient to trigger constitutional inquiry present, the fact is, of course, that this case involves an area far removed from the intimate, familial areas to which the Court in *Paul* v. *Davis* referred and

* Lower federal courts which have considered demands that a constitutional "right of privacy" be recognized as against newspapers have, like the New York Court of Appeals, rejected it. Thus in *Reilly* v. *Leonard*, 459 F.Supp. 291, 299 (D.Conn. 1978), the court held that "[t]he right to be free from unwarranted and unwanted publicity" is not protected by the Constitution and that protection of such privacy interest, if any, must be left to the States. The court, in reaching this result, relied on *Katz* v. *United States*, 389 U.S. 347, 350-51 (1967), which expressly recognized that protection of privacy against non-governmental intrusion—the "right to be let alone by other people—is . . . left largely to the law of the individual States." (Footnotes omitted.)

which has provided the focus of privacy concern in this Court. *See e.g., Roe* v. *Wade,* 410 U.S. 113 (1973) [government restrictions on abortion]; *Zablocki* v. *Redhail,* 434 U.S. 374, 375, 385 (1978) [government limitation on marriage by those not supporting children]; *Carey* v. *Population Services Int'l,* 431 U.S. 678, 684-85 (1977) [government limits birth control information]; *Moore* v. *City of East Cleveland,* 431 U.S. 494, 499 (1977) [impact of government zoning law on family]; *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 639-40 (1974) [school board restrictions on work by pregnant teachers]; *Whalen* v. *Roe,* 429 U.S. 589 (1977) [Court rejected claim of privacy based on government dissemination of private information]. There is no basis for imposition of a novel federal constitutional right of action here.

Indeed, recognition of such a federally mandated right of action here would itself raise issues of constitutional significance as to freedom of speech and press. This Court has expressed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .", *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), and, as a consequence, has imposed vigorous limits on liability for even false and defamatory speech. Permitting liability to be based upon the use of a photograph illustrating an article of social significance, solely because petitioner disagrees with the point of view advanced in the article, would irreparably diminish the "profound national commitment" recognized by this Court.

Moreover, the imprecise and boundless constitutional privacy "cause of action" apparently urged by the petitioner would work profound mischief even if its basic theory were not seriously in error, for "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

The State of New York has chosen to extend protection to privacy as set forth in its statutes. It has declined to extend them to cover the present situation. There is authority neither in the Constitution nor in sound policy for this Court to impose the rigidity of a federal right of action in an area of such sensitive concern. The unanimous and well-reasoned opinion of the Court of Appeals should not be disturbed.

CONCLUSION

For the reasons set forth above, it is submitted that the petition presents no basis for the granting of the writ by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel for Respondent
The New York Times Company

Of Counsel:

DEAN RINGEL
HOWARD G. SLOANE
RICHARD COLL
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

KATHARINE P. DARROW
GEORGE FREEMAN
The New York Times Company
229 West 43rd Street
New York, New York 10036

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